

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 271 Consumer Protection
SPONSOR(S): Business & Professions Subcommittee; Nuñez
TIED BILLS: **IDEN./SIM. BILLS:** CS/SB 604

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Business & Professions Subcommittee	12 Y, 0 N, As CS	Butler	Luczynski
2) Civil Justice Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

The bill, titled the "True Origin of Digital Goods Act," requires owners and operators of websites or online services (websites) that deal in substantial part with the electronic dissemination of commercial recordings and audiovisual works to provide personal identification information plainly on the website. The bill provides that the owner or operator of such website must post their true and correct name, address, and either a telephone number or e-mail address.

The bill provides definitions for "commercial recording or audiovisual work," "electronic dissemination," and "website."

An owner, assignee, authorized agent, or licensee of a commercial recording or audiovisual work may bring a private cause of action to obtain a declaratory judgment that an owner or operator of a website has knowingly failed to disclose his or her personal information. The court may then compel compliance with the disclosure requirements of this bill.

Prior to bringing a cause of action under this bill, the aggrieved party must make reasonable efforts to place an individual on notice and provide 14 days to cure before filing a civil action.

Proponents argue that bad actors are unlikely to disclosure the personal information required by this bill, and thus, this bill will allow owners of copyrighted works to indirectly protect their intellectual property.

In a cause of action under this bill, the prevailing party is entitled to recover necessary expenses and reasonable attorney fees.

The bill has no fiscal impact on local or state funds.

The bill has an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

The Internet and Intellectual Property

The rise of the Internet has provided many opportunities and challenges for the free communication of thoughts and ideas. Among these challenges is the effective protection of intellectual property and copyrights when individuals can quickly and efficiently distribute creative works with low barriers to reproduction. A system that protects the rights of creative content producers to choose how their works are displayed and distributed must be balanced against creating barriers that may fundamentally alter the nature of the Internet and the free flow of knowledge and information.

Because of the distributed and semi-anonymous nature of the Internet, it is difficult to strike a balance between the rights of all the stakeholders involved, and difficult to enforce regulations and responsibilities on individuals, content, and conduct. The Internet seamlessly crosses all political borders and traditional regulatory jurisdictions.

Additionally, bad actors have used the relatively open nature of the Internet, and the lack of barriers for the distribution of information and content to ignore intellectual property and copyright protections and injure creative content producers who are unable to derive the exclusive benefits of the works they create. With so many competing interests to balance, legislation that addresses the practices of the Internet faces extensive scrutiny from many interested parties.

Federal Copyright Law

The United States Constitution explicitly grants Congress the power to create copyright law with the copyright clause, which states, “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹

Copyright law encourages the creation of art and culture by rewarding authors and artists with exclusive rights to make and sell copies of their works, the right to create derivative works, and the right to perform or display their works in public. These rights are governed by the federal Copyright Act of 1976,² and generally these rights do not expire until 70 years after the author or artist’s death.

The Digital Millennium Copyright Act³ (DMCA) was passed in 1998 to update and modernize the United States’ copyright protections for the Internet age. The DMCA criminalizes production and dissemination of technology used to circumvent digital rights management software (DRM) and other types of access controls, and heightens the penalties for copyright infringement on the Internet. The DMCA also provides several “safe harbor” provisions for providers of online services (such as YouTube) that provide hosting for user generated content. Under the DMCA’s safe harbor provisions, online services that follow the DMCA’s takedown procedures are able to limit their liability for the copyright infringement of users of their service.⁴

Although when used appropriately the DMCA’s safe harbor provisions protect copyright owners, there are many reports of bad actors abusing DMCA takedown requests to remove completely legal content. In order to benefit from the protections of the DMCA’s safe harbor provisions, an online service must immediately remove any content that is identified as offending at the request of a self-identified content

¹ U.S. CONST. art. 1, § 8, cl. 8.

² Copyright Revision Act of 1976, 90 Stat. 2541, 17 U.S.C. § 101 et seq. (1982).

³ Digital Millennium Copyright Act, PL 105–304, Oct. 28, 1998, 112 Stat 2860.

⁴ See generally, *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 25 (2d Cir. 2012).

owner or face financial liability for possible infringements. Many online services do not have the ability to review every takedown request and simply remove any flagged content. Further, it is difficult to hold persons accountable who abuse the DMCA takedown provisions as a tool for censorship.⁵

Some examples of improper takedown requests include misidentification of copyrighted works,⁶ meritless takedown requests of political ads,⁷ or takedown requests performed with malice and the intent to harm the content producer's reputation or revenue.⁸ DMCA takedown notices used improperly can be used to censor speech and may have a chilling effect on free speech.⁹

It is possible that the Federal Copyright Act may "completely preempt" any state laws related to copyright. Under the "complete preemption doctrine," state law claims that are "arising under" the subject matter of a Federal act may be completely preempted to federal courts if Congress intended an exclusive federal remedy, and federal courts are granted exclusive jurisdiction to decide claims and causes of action related to the Federal act.¹⁰

Several Federal Circuit Courts have held that the "complete preemption doctrine" can be applied to Federal Copyright Law; however, the Eleventh Circuit Court of Appeals, which directly controls questions of Federal law within Florida, has not held whether the complete preemption doctrine applies to Copyright Law.¹¹

Rogue Copyright Infringing Websites

The Copyright Office of the United States has identified bad actors who build online businesses based upon infringing copyright and engaging in related illegal activity. The operators of these sites are able to act with impunity because there is little expectation of enforcement of copyright or other laws.

These rogue websites flagrantly engage in illegal activities, and offer for sale or download many copyrighted movies, music, books, and software. Many rogue websites make money through both direct transactions (selling copyrighted content) and indirect transactions (ad revenue or subscription services).

Rogue websites may also attempt to steal a consumer's financial information and take advantage of unsuspecting consumers private information. Some rogue websites may falsely state that they have relationships with well-known payment processing services (such as credit cards); however, when a consumer attempts to pay, the website redirects payment to alternative and possibly insecure services.

There appears to be widespread consensus on the existence and methods of these rogue websites; however, there is often disagreement over solutions that are presented to address these bad actors.¹² Protecting a copyright owner's right to benefit from their creative content is balanced against unduly restricting the freedom of speech and privacy rights of good actors who are not infringing against copyright laws, but may be impeded by regulations imposed to protect a copyright.

⁵ See generally Lydia Pallas Loren, Deterring Abuse of the Copyright Takedown Regime by Taking Misrepresentation Claims Seriously, 46 Wake Forest L. Rev. 745, 746 (2011) (discussing copyright takedown abuse, and noting that "misrepresentation claims have been brought [against abusers of takedown notices], and the early interpretations of the [misrepresentation] provisions have limited their effectiveness in curbing abuse").

⁶ See John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either*, N.Y. TIMES (September 25, 2003), <http://www.nytimes.com/2003/09/25/business/media/25TUNE.html>.

⁷ Center for Democracy & Technology, *CDT Releases Report on Meritless DMCA Takedowns of Political Ads*, (Oct. 12, 2010), <https://cdt.org/insight/cdt-releases-report-on-meritless-dmca-takedowns-of-political-ads/>.

⁸ See generally, Google, *Transparency Report*, <http://www.google.com/transparencyreport/removals/copyright/faq/> (Listing several "inaccurate or intentionally abusive copyright removal requests" submitted to Google).

⁹ Wendy Seltzer, Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment, 24 Harv. J.L. & Tech. 171 (2010).

¹⁰ 17 U.S.C § 301 (2012); *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 303 (2d Cir. 2004).

¹¹ *Stuart Weitzman, LLC v. Microcomputer Res., Inc.*, 542 F.3d 859, 864 (11th Cir. 2008) .

¹² Maria A. Pallante, Acting Register of Copyrights, *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part I*, (Mar. 14, 2011), available at <http://www.copyright.gov/docs/regstat031411.html>.

Attempted Federal Solutions

The Stop Online Privacy Act (SOPA) was introduced to Congress on October 26, 2011, with the intent to expand the ability of United States law enforcement to combat online copyright infringement and the online trafficking of counterfeit goods. The bill faced intense scrutiny after its introduction.

Provisions included requesting court orders to bar advertising networks and payment facilities from conducting business with infringing websites, preventing search engines from linking to identified rogue websites, and expediting court orders to require Internet service providers block access to rogue websites. The proposed law would have expanded criminal laws to include unauthorized streaming of copyrighted content and imposed a maximum penalty of five years in prison.

Proponents stated the legislation would protect the intellectual-property market and corresponding industry, jobs, and revenue, and was necessary to bolster enforcement of copyright laws, claiming current laws do not cover foreign-owned or operated websites, and citing examples of rogue websites that were flagrantly offending U.S. copyright law.¹³

Opponents claimed the proposed legislation was expansive and would impose liability on many more entities than just rogue websites. Opponents argued that the bill threatened freedom of speech and innovation on the Internet, would bypass the safe harbor provisions of the DMCA, and would even expose libraries to prosecution for previously completely legal and free speech conduct.¹⁴

In protest of SOPA and its House counterpart the PROTECT IP Act (PIPA), many online services, websites, and consumers organized an online blackout in an attempt to illustrate the possible repercussions should they be passed. On January 18, 2012, the English Wikipedia, Google, Reddit, and an estimated 7,000 websites coordinated a service blackout in protest against the bills.¹⁵ A petition at Google recorded over 4.5 million signatures;¹⁶ and lawmakers reportedly collected "more than 14 million names—more than 10 million of them voters—who contacted them to protest" of the bills.¹⁷ The bills were ultimately postponed until an agreement on a solution was found.

Protecting Personal Information on the Internet

There is an inherent risk involved when disclosing private information on the Internet. Bad actors can use information found on the Internet to assist in identity theft, use personal information to harass, extort, coerce, or publicly shame a person by violating their online privacy, and even trick an emergency service into dispatching a police response team to a target's address based on false reports of imminent danger or injury.¹⁸

¹³ David Carr, *The Danger of an Attack on Piracy Online*, N.Y. TIMES (Jan. 2, 2012), at B1, available at <http://www.nytimes.com/2012/01/02/business/media/the-danger-of-an-attack-on-piracy-online.html>.

¹⁴ *Id.*

¹⁵ Rob Waugh, *U.S. Senators withdraw support for anti-piracy bills as 4.5 million people sign Google's anti-censorship petition*, DAILYMAIL.COM (Jan. 20, 2012), <http://www.dailymail.co.uk/sciencetech/article-2088860/SOPA-protest-4-5m-people-sign-Google-anti-censorship-petition.html>.

¹⁶ Deborah Netburn, *Wikipedia: SOPA protest led 8 million to look up reps in Congress*, L.A. TIMES BLOGS (Jan. 19, 2012), available at <http://latimesblogs.latimes.com/technology/2012/01/wikipedia-sopa-blackout-congressional-representatives.html>.

¹⁷ Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, (Jan. 21, 2012) at B6, available at <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html>.

¹⁸ Sasha Goldstein, *Suburban Denver 'swatting' incident caught on gamer's camera*, N.Y. DAILY NEWS (Aug. 27, 2014), <http://www.nydailynews.com/news/national/suburban-denver-swatting-incident-caught-gamer-camera-article-1.1919640> (reporting on YouTube user Jordan Mathewson being swatted and broadcasted the incident live while streaming playing games over the Internet); Brian Crecente, *Destiny developer startled awake by police sheriff's helicopter after faked 911 call*, POLYGON (Nov. 7, 2014), <http://www.polygon.com/2014/11/7/7172827/destiny-swatting> (Unnamed Destiny video game developer is a victim of a swatting in Washington State home).

The difficulty in identifying bad actors because of a lack of identifying personal information available on a semi-anonymous website, as well as the general expense and delay of Federal causes of action have led to the development of state law causes of action in an attempt to find better solutions.

Effect of the Bill

Definitions

The bill defines a “commercial recording or audiovisual work,” as a:

[A] recording or audiovisual work whose owner, assignee, authorized agent, or licensee has disseminated or intends to disseminate such recording or audiovisual work for sale, rental, or for performance or exhibition to the public, including under license, but does not include an excerpt consisting of less than substantially all of a recording or audiovisual work. A recording or audiovisual work may be commercial regardless of whether a person who electronically disseminates it seeks commercial advantage or private financial gain from the dissemination. The term does not include video games, depictions of video game play, or the streaming of video game activity.

A “recording or audiovisual work” that is disseminated or intended to be disseminated for sale, rental, performance or exhibition, appears to include all video or audio content available on the Internet. Any recording or audiovisual work that is on the Internet is likely exhibited to the public. The definition “commercial recording or audiovisual work” appears to include commercial and noncommercial recordings and audiovisual works as it does not require a person to seek commercial advantage or private financial gain to be considered “commercial” in this bill.

The definition excludes “an excerpt consisting of less than substantially all of a recording or audiovisual work”. This language seems to limit the definition of “commercial recording or audiovisual work” to only those works that are complete, and not include simply portions or excerpts of said works. In some cases, an excerpt may be considered a “commercial recording or audiovisual work” completely independent of the original work.

The definition explicitly excludes video games, video game streaming, or depictions of video game play from the definition of “commercial recording or audiovisual work.” This exception would remove a significant amount of content from the definition of “commercial recording or audiovisual work.”

Video or audio content on a website will thus be excluded, so long as the video or audio content only contains “video games, depictions of video game play, or the streaming of video game activity.” Additional content within such videos such as commentary, music, soundtracks, or other non-video game related content may cause such videos to be considered “commercial recordings or audiovisual works” under this bill and subject to the disclosure requirements.

The bill defines a “website” as a “set of related webpages served from a single web domain.” Further, the bill clarifies that the term “website” does not include “a homepage or channel page for the user account of a person that is not the owner or operator of the website upon which such user homepage or channel page appears.”

The bill defines “electronic dissemination” to mean the transmission of, making available, or otherwise offering a “commercial recording or audiovisual work” for distribution through the Internet. The definition of electronic dissemination includes many forms of hosting content on the Internet, including directly hosting, linking to content hosted elsewhere, or otherwise distributing information where “commercial recordings or audiovisual works” may be located.

Disclosure of Information

The bill requires that a person who “owns or operates a website or online service dealing “in substantial part” in the electronic dissemination of commercial recordings or audiovisual works,” to clearly and conspicuously disclose their personal information, including his or her true and correct name, physical address, and either a telephone number or e-mail address. A corporation is considered a “person” in this case.

The phrase “in substantial part” is not defined. It is unclear how many “commercial recordings or audiovisual works” must be disseminated by a website before the website or online service is considered to be dealing “in substantial part” in the dissemination of such under this bill.

The disclosure requirements of this bill are required even if all recordings or audiovisual works disseminated by the website are owned by the website owner.

Injunctive Relief

The bill allows an “owner, assignee, authorized agent, or licensee” of a “commercial recording or audiovisual work” that was electronically disseminated by a website where the owner or operator of said website knowingly failed to disclose their personal information to bring a private cause of action to enforce the disclosure requirements of this bill.

As a condition precedent to filing suit under the cause of action created by this bill, the individual must make reasonable efforts to place the owner or operator on notice of the violation and that failure to cure within 14 days may result in a civil action filed in a court of competent jurisdiction.

It is unclear if Florida could assert jurisdiction over foreign websites should an aggrieved party attempt to enforce the disclosure requirements of this bill against a website owner or operator located outside of Florida. Proponents do not expect websites owners or operators located outside of Florida to respond to law suits or submit willingly to jurisdiction in Florida courts. As such, proponents expect for any proceedings against owners or operators of websites located outside of Florida to end in default judgments.

Following a default or other declaratory judgment, proponents intend to proceed with third party injunctions to discourage Internet service providers, hosting services, payment services or other Internet website services from working with websites that fail to disclose their personal information required by this bill.

Proponents argue that bad actors are unlikely to disclosure the personal information required by this bill, and thus, this bill will allow owners of copyrighted works to indirectly protect their intellectual property.

The bill allows prevailing party in a cause under this section is entitled to recover necessary expenses and reasonable attorney fees.

B. SECTION DIRECTORY:

Section 1 creates s. 501.155, F.S., to define “commercial recording or audiovisual work,” “electronic dissemination,” and “website”; require the disclosure of personal information on websites dealing in substantial part in disseminating commercial recordings and audiovisual works; providing injunctive relief for aggrieved parties.

Section 2 provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Freedom of Speech: Right Not to Speak

The First Amendment promotes the free exchange of ideas and information by prohibiting the government from restricting speech because of the message expressed.¹⁹

Not only does the First Amendment protect the right to speak, but it protects the right to refrain from speaking and the right to refrain from endorsing any particular view. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,²⁰ the United States Supreme Court held that a state could not require a private parade sponsor to allow participation by a group which imparted a message that the sponsoring organization did not wish to convey.²¹ Despite the general prohibition against forced speech, however, federal courts have allowed certain organizations to collect dues and fees that may be used to engage in advocacy hostile to the beliefs of some dues payers.

The bill requires a person who owns or operates a website to disclose certain personal information. This disclosure requirement may have First Amendment implications regarding a person's right not to speak and not to disclose such personal information to the public.

¹⁹ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989); *State v. T.B.D.*, 656 So.2d 479 (Fla. 1995).

²⁰ 515 U.S. 557 (1995).

²¹ See also *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (a school may not require students to salute the flag or recite the pledge of allegiance).

Freedom of Speech: Overbroad Regulations

Additionally, under the First Amendment, laws that burden substantially more speech than is necessary to further a compelling interest are invalid.²² Overbroad regulations are disfavored because they produce a chilling effect on free speech by dissuading the exercise of legitimate First Amendment Rights.²³ Overbroad regulations also lend themselves to selective enforcement.²⁴ The overbreadth doctrine contains an important exception to normal standing requirements. It allows a litigant challenging an overbroad regulation to assert the First Amendment rights of persons not before the court.

The disclosure requirements of this bill will apply to a large amount of content and websites currently on the Internet, which may have First Amendment overbreadth implications.

Federal Preemption of Copyright Law

The United States Constitution explicitly grants Congress the power to create copyright law with the copyright clause, which states, “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²⁵

The Federal Copyright Act provides exclusive jurisdiction to federal district courts of claims and causes of action that “arise under” any Congressional act related to copyright.²⁶ Even in situations where a copyright is not directly at issue and only state law claims are argued, such state law claims could still potentially be preempted by the Copyright Act.²⁷

Under the “complete preemption doctrine,” Federal law completely preempts a state law “arising under” a Congressional act.²⁸ Citing the Supreme Court’s recent decision in *Beneficial Nat. Bank v. Anderson*,²⁹ expanding the doctrine of complete preemption, the Second Circuit Court of Appeals found that copyright claims and all legal and equitable rights related to copyright fall within the exclusive jurisdiction of the federal courts.³⁰ The Second Circuit detailed a two-pronged analysis to determine if a state law would be preempted by the Copyright Act, specifically:

The Copyright Act exclusively governs a claim when: (1) the particular work to which the claim is being applied falls within the type of works protected by the Copyright Act under 17 U.S.C. §§ 102 and 103, and (2) the claim seeks to vindicate legal or equitable rights that are equivalent to one of the bundle of exclusive rights already protected by copyright law under 17 U.S.C. § 106.³¹

The prongs of this test are referred to as the “subject matter requirement” and the “general scope requirement.”³² The subject matter requirement is satisfied if the claim is related to an act or work that would normally be covered by the Copyright Act.³³ The general scope requirement is only satisfied

²² *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)(requiring “substantial” overbreadth); *Thornhill v. Alabama*, 310 U.S. 88, 99-101 (1940).

²³ *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997).

²⁴ *In re Primus*, 436 U.S. 412, 432-33 (1978).

²⁵ U.S. CONST. art. 1, § 8, cl. 8

²⁶ 17 U.S.C § 301; *Briarpatch*, 373 F.3d at 303.

²⁷ *Briarpatch*, 373 F.3d at 303.

²⁸ *Id.*

²⁹ 539 U.S. 1, 11 (2003).

³⁰ *Briarpatch*, 373 F.3d at 303.

³¹ *Id.* at 305.

³² *Id.* at 303.

³³ *Id.*

when a state law affects a right provided by federal copyright law, or specifically, a state regulates acts of reproduction, adaptation, performance, distribution or display of copyrighted works.³⁴

The Eleventh Circuit Court of Appeals decides questions of Federal law within Florida, secondary only to the Supreme Court of the United States, and has not held whether the Copyright Act has complete preemptive effect, although it did note that “four other circuits have held that at least some state law claims are preempted by the Copyright Act such that federal subject matter jurisdiction exists over the claim under the complete preemption doctrine.”³⁵

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The phrase “less than substantially all” is not defined. It is unclear when a “commercial recordings or audiovisual work” is no longer “substantially all” of the work, or at what point an excerpt would no longer be considered a “commercial recording or audiovisual work” under this bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 3, 2015, the Business & Professions Subcommittee considered and adopted three amendments. These amendments:

- Provided clarity by defining “website”;
- Clarified that the person with a cause of action against a website is the owner, assignee, authorized agent, or licensee of a “work” that was electronically disseminated by the website that failed to meet the disclosure requirements of this bill; and,
- Required that a person knowingly violate the disclosure requirements of this bill, and prior to filing a cause of action created by this bill, the aggrieved party must make reasonable efforts to place the owner or operator on notice of the violation and provide an opportunity to cure.

The staff analysis is drafted to reflect the committee substitute.

³⁴ *Id.*

³⁵ See *Stuart Weitzman, LLC*, 542 F.3d at 864 (noting that the First, Second, Fourth and Sixth Circuits have all held that the Copyright Act could have complete preemptive effect).